79-1509

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term 1979

COMMITTEE TO PROTECT THE FIRST AMENDMENT RIGHTS OF EMPLOYEES OF THE DEPARTMENT OF AGRICULTURE,

Petitioner,

v.

BOB BERGLAND, INDIVIDUALLY AND AS SECRETARY OF AGRICULTURE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No.

COMMITTEE TO PROTECT THE FIRST AMENDMENT RIGHTS OF EMPLOYEES OF THE DEPARTMENT OF AGRICULTURE,
Petitioner,

v.

BOB BERGLAND, INDIVIDUALLY AND AS SECRETARY OF AGRICULTURE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Committee to Protect the First Amendment Rights of Employees of the Department of Agriculture, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the D.C. Circuit, not yet reported, is reproduced at Part D of the Appendix. The memorandum opin-

ion and order of the district court on remand is unpublished and is reproduced at Part C of the Appendix. The Judgment of the United States Court of Appeals for the D.C. Circuit remanding the case to the district court is unpublished and is reproduced at Part B of the Appendix. The Findings of Fact and Conclusions of Law of the district court granting respondent's motion for summary judgment, reported at 434 F. Supp. 314 is reproduced at Part A of the Appendix.

JURISDICTION

The judgment of the court of appeals was entered December 27, 1979. App. 23a. The jurisdiction of this Court is invoked under 28 USC §1254(1).

QUESTION PRESENTED

Whether the circuit court and district court holdings have limited or misinterpreted *Elrod v. Burns,* 427 U.S. 347 (1976) by excluding State Directors of the Farmers Home Administration and State Executive Directors of the Agricultural Stabilization and Conservation Service whose positions have been defined by the Civil Service Commission as non-policy determining and non-confidential from the constitutional protections identified in *Elrod v. Burns.*

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

Petitioner's claim herein is based upon the First Amendment to the Constitution of the United States of America. The relevant provisions of Title 5 of the Code of Federal Regulations provide as follows:

"§6.2 *Schedules of excepted positions*

The Commission shall list positions that it excepts from the competitive service in Schedules A, B and C, which schedules shall constitute parts of this rule, as follows:

"Schedule A. Positions other than those of a confidential or policy-determining character for which it is not practicable to examine shall be listed in Schedule A.

Schedule B. Positions other than those of a confidential or policy-determining character for which it is not practicable to hold a competitive examination shall be listed in Schedule B. Appointments to these positions shall be subject to such non-competitive examination as may be prescribed by the Commission.

Schedule C. Positions of a confidential or policy-determining character shall be listed in Schedule C."

"Schedule A

§213.3101 Positions other than those of a confidential or policy-determining character for which it is not practicable to examine.

(a) The positions enumerated in §§213.3102 to 213.3199 are positions other than those of a confidential or policy-determining character for which it is not practicable to examine and which are excepted from the competitive service and constitute Schedule A."

§213.3113 Department of Agriculture.

(d) Agricultural Stabilization and Conservation Service. (1) Six positions of Regional Director at GS-14 and GS-15.

(2) Members of State Committees.

(3) State Executive Directors.

(e) Farmers Home Administration.
(1) State committeemen to consider, recommend, and advise with respect to the Farmers Home Administration program.
(2) County committeemen to consider, recommend, and advise with respect to the Farmers Home Administration program.
(3) Temporary positions whose principal duties involve the making and servicing of emergency loans pursuant to current statutes authorizing emergency loans. Appointments under this provision shall not exceed 1 year unless extended with the prior approval of the Commission for additional periods not to exceed 1 year each.
(4) State Directors and not to exceed three positions of State Director-at-Large."

STATEMENT

Petitioner is an *ad hoc* organization composed of former employees of the Department of Agriculture who occupied positions in the field service as either State Directors of the Farmers Home Administration (FmHA) or State Executive Directors of the Agricultural Stabilization and Conservation Service (ASCS). The United States Civil Service Commission (Commission) has excepted both positions from the competitive civil service

classifying them Schedule A.[1] The Schedule A positions are defined by the Commission as "positions other than those of a confidential or policy-determining character for which it is not practicable to examine . . ."[2]

On April 22 and April 25, 1977, the newly appointed Secretary of Agriculture discharged without cause a total of 9 FmHA State Directors and 17 ASCS State Executive Directors. The Committee brought this lawsuit in district court seeking injunctive relief claiming the Secretary was dismissing and threatening to dismiss its members from their positions for partisan political reasons and threatening to and had appointed political supporters of the Carter Administration to the positions previously occupied by its members in consideration of their political support.

The district court found that petitioner's members were fired for political reasons and considerations, stating that "these were patronage dismissals, pure and simple." Despite this finding, the district court nevertheless dismissed petitioner's complaint and upheld the dismissals relying primarily upon its conclusion that petitioner's members were policy making, confidential employees not within the ambit of this Court's decision in *Elrod v. Burns,* 427 U.S. 347 (1976).

Subsequently, two letters were sent from the Chairman of the Commission to the Secretary of Agriculture. On August 5, 1977, the Commission declined the Secretary's request to reclassify State Executive Directors of

---

[1] 5 CFR §§213.3101, 213.3113(d)(3) and (e)(4) (1978).

[2] 5 CFR §6.2 (1978); 5 CFR §213.3101 (1978). The same definition appears in the Commission's regulations pertaining to such posts in the Department of Agriculture. 5 CFR §213.3101 (1978).

ASCS from Schedule A to Schedule C.[3] It stated: "The Commission cannot conclude at this time that (State Executive Directors of ASCS) meet the Schedule C criteria for exception as policy-determining or confidential."

In a second letter, dated March 29, 1978, the Secretary restated his view that State Directors of ASCS should be converted from Schedule A to Schedule C and also stated his belief that FmHA State Directors "should be in the career service."[4]

The circuit court remanded the case to the district court for consideration of the March 29, 1978 letter. Upon remand, the district court considered both letters, finding that they "(did) not affect (its) previous determination" and granted summary judgment. Petitioner's appeal followed.

Although petitioner argued below that the Commission's regulations defining the Committee members' positions as non-policy determining and non-confidential, taken together with the letters of Messrs. Campbell and Bergland, conclusively established that the dismissals constitutionally were impermissible based upon the concurrence in *Elrod v. Burns,* 427 U.S. at 374-75 (Stewart, J. concurring), the circuit court affirmed the district court's conclusion that the positions occupied by the members of the Committee were policy making and therefore the discharge of the incumbents did not infringe upon their constitutional rights. In so doing, the court wholly ignored the contrary and long-

[3]The Chairman's letter is reproduced at page 4 of the D.C. Circuit's Opinion.

[4]The Secretary's letter is reproduced at page 5 of the D.C. Circuit's Opinion.

standing determination by the Civil Service Commission — the agency charged by Congress as having the expertise to make such determinations.

THE QUESTION PRESENTED AFFORDS THE COURT AN OPPORTUNITY TO CLARIFY THE DISTINCTION BETWEEN POLICY-MAKING AND NON-POLICY MAKING POSITIONS IN THE FEDERAL SECTOR FOR PURPOSES OF THE APPLICATION OF *ELROD V. BURNS*

The affirmance of the trial court's judgment guarantees widespread and unbridled patronage practices within the federal government. By ignoring the Commission's determination that petitioner's members occupied non-policy determining and non-confidential positions, the D.C. Circuit has virtually insured that political factors will control the selection of not only FmHA and ASCS state directors, but, as well, the selection of literally thousands of other federal employees classified by the Commission as Schedule A.[5] Furthermore and perhaps more importantly, the decisions below fatally erode an important and meaningful guideline that can be used to separate those jobs which legitimately are "political plums" from those which are not.

It is vital that the question presented herein be decided by this Court. The decisions below have a serious and devastating effect upon the proper operation of the patronage system in the federal sector. These decisions, if allowed to stand, insure that patronage will be practiced with abandon, bridled only by the judiciary on a

[5]Among others, attorneys in government service are classified as Schedule A (§213.3101 Federal Personnel Manual (July 31, 1978)). So also are law clerks and chaplains (Id.) and custodians, guards and laborers at the General Services Administration (5 CFR §213.3134(a)(1) (1978)).

case by case basis. Plainly, First Amendment rights may be protected in this manner, but only to the limited degree that individuals may (1) be able to recognize that their individual rights are being encroached upon and (2) to the extent that an individual may have the time and financial resources to prosecute those rights in the judicial system.

This case provides the Court a unique and important opportunity to provide guidance not only to literally thousands of individuals, but, as well, to the courts below. It affords the Court an opportunity to decide an important question of federal law which has not been, but should be, settled by this Court.

The plurality in *Elrod* recognized that "(n)o clear line can be drawn between policy making and non-policy making positions." 427 U.S. at 367. Moreover, as Judge Campbell, in his concurring opinion in *Illinois State Employees Union, Council 34, etc. v. Lewis,* stated:

> "It is simple enough to say that janitors, clerk-typists and elevator operators are 'non-policymaking' employees, but how far up in the bureaucratic echelon can a distinction be judicially drawn . . . The difficulty arises in attempting to fashion an appropriate and workable judicial standard for distinguishing between 'policymaking' and 'non-policymaking' positions." 473 F2d 561, 578 (1972), *cert.den.* 413 U.S. 928 (1973).

And the Harvard Law Review recently stated:

> "No clear line can be drawn between policymaking and non-policymaking positions. Elevator operators and janitors clearly fall within the court's proscription of patronage firings and department heads clearly do not; the applicability of the *Elrod* decision to the broad range of jobs in between these extremes remains to be resolved on a case by case basis." 90 Harvard Law Review 56, 194.

This case, however, presents the Court with an opportunity to clarify the line between policymaking and non-policymaking positions in the federal sector. Indeed, the line has already been drawn, for nearly 30 years, by the Civil Service Commission – the agency entrusted by Congress to make such determinations.

Strong discontent with the corruption and inefficiency of the patronage system during Andrew Jackson's Administration led Congress to enact the Pendleton Act,[6] the foundation of modern civil service. And, as stated by Justice Burger:

> "Congress long ago, as a matter of policy, opted for a federal career service with a small number of purely political appointments in the Executive Branch, and many governmental departments have a limited number of positions in which the persons appointed have no tenure but serve at the pleasure of the cabinet officer or agency chief, who in turn serves at the pleasure of the President. *See, e.g., Leonard v. Douglas,* 116 U.S.App.D.C. 136, 321 F2d 749 (1963). The considerations leading to these legislative conclusions are – for me – not open to judicial scrutiny under the guise of a First Amendment claim, any more than is the

[6]Act of Jan. 16, 1883, c.27 §2(2) 5-6, 22 Stat. 404.

> right of a newly elected Representative or Senator, for example, to have a staff made up of persons who share his political philosophy and affiliation and are loyal to him. It seems to me that the Illinois Legislature's choice is entitled to no less deference." *Elrod v. Burns,* 427 U.S. at 376 Burger, J. dissenting).

Similarly, petitioners urge that the determination of the Civil Service Commission respecting the non-policy determining, non-confidential nature of the positions involved herein is entitled to great deference.[7]

Accordingly, because the court below gave no deference to the long-standing classification by the Commission of the positions herein as non-policy determining and non-confidential, its holding is clearly erroneous under *Griggs v. Duke Power* and *Udall v. Tallman, supra,* and as such should not be allowed to stand.

[7] *Griggs v. Duke Power,* 401 U.S. 424 (1970); *United States v. Chicago,* 400 U.S. 8 (1970); *Udall v. Tallman,* 380 U.S. 1 (1965). Deference is even more clearly due because of the Commission's consistent reading of its regulation over a long period of time. See Bergland and Campbell letters, *supra. E.g., Committee for Open Media v. FCC,* 633 F2d 1 (D.C.Cir.1976).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March, 1980

APPENDIX A
Filed June 3, 1977
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMITTEE FOR PROTECTION OF FIRST AMENDMENT RIGHTS OF DEPARTMENT OF AGRICULTURE EMPLOYEES, Plaintiff,	)	
v.	)	Civil Action No. 77-0481
BOB BERGLAND, Secretary of Agriculture, et al., Defendants.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Introduction

Plaintiff, an *ad hoc* organization composed of past and present employees of the United States Department of Agriculture occupying positions in the field service entitled "state directors" of the Farmers Home Administration (FmHA) and "executive directors" of the Agricultural Stabilization and Conservation Service (ASCS), brought this action for declaratory and injunctive relief to enjoin the defendants from denying its members employment "on the basis of their political beliefs and associations."[1] The gravamen of the complaint is that defendant Bergland, the Secretary of Agriculture, "is dismissing and threatening to dismiss plaintiff's members from their positions . . . for partisan political reasons and threatening to and has appointed political supporters of the Carter administration to the

[1]Complaint, ¶ 4.

positions now occupied by plaintiff's members in consideration of their political support."[2] Additionally, plaintiff alleges that the Department of Agriculture has requested the Civil Service Commission to re-classify the employment positions at issue in order to evade its members' statutory and constitutional rights. Moreover, it is asserted that any action undertaken by the Civil Service Commission (Commission) to this end, as well as, the rules guiding the Commission in this regard, operate to deny plaintiff's members their rights, under the First and Fifth Amendments to the United States Constitution.

On April 22, and April 25, 1977, the Department of Agriculture terminated a total of nine (9) FmHA State Directors and seventeen (17) ASCS State Executive Directors. The following day, at plaintiff's request, a hearing was held on plaintiff's motion for a temporary restraining order which motion was denied. Subsequently, a plaintiff filed a motion for a preliminary injunction, which the defendants opposed. Defendants also submitted a motion to dismiss. On May 12, and May 13, 1977, a hearing was held on the motion for a preliminary injunction consolidated with a hearing on the merits. Fed. R. Civ. P. 65(a)(2). Based on the hearing and the record herein, the Court makes the following findings of fact and conclusions of law.

Findings of Fact

1. The Agricultural Stabilization and Conservation Service (ASCS) is an agency within the Department of Agriculture. Its principal functions include the ad-

[2]Complaint, ¶ 6, p. 2.

ministration of the acreage allotment and farm marketing quota program under the Agricultural Adjustment Act of 1928, as amended, 7 U.S.C. § 1310 *et seq.*, and of commodity price support and farmland conservation programs. See 7 C.F.R. § 2165. ASCS supervises and works through county committees elected by farmers in each state, pursuant to 16 U.S.C. § 590h(b). State Committees establish the policies for program operations within the State to achieve the Administration's program objectives.

2. State Executive Directors are appointed by the Administrator of ASCS, upon the recommendation of the State Committee. The State Executive Director is responsible for planning, organizing, directing and coordinating the program and management operations of the ASCS State Office, which administers ASCS Programs. He also assists the State Committee in determining and establishing ASCS State policies and programs. There are a total of 50 State Executive Director positions.

3. The Farmers Home Administration (FmHA) is also an agency within the Department of Agriculture. It is responsible for loan and grant and other assistance programs for the benefit of rural areas, including assistance authorized under the Consolidated Farm and Rural Development Act, 7 U.S.C. §§ 1291 *et seq.*

4. FmHA has a National Office in Washington, D.C., 42 State Offices, some serving more than one state, and approximately 1750 local County Offices. Each State Office is under the supervision of a State Director who is responsible to the FmHA administrator, for FmHA programs in one or more states, in accordance with established policies and delegations of authority. See 7 C.F.R. § 1800.22.

5. The testimony of Mr. Victor Senechel, Acting Administrator of ASCS, and Mr. Harold Gross, Assistant to the Secretary of Agriculture for Personnel, indicated that both the FmHA State Directors and the ASCS State Executive Directors, exercise considerable control over the implementation of the administration's agricultural program policies at the state and local level, and, thereby, insure either the success or failure of the programs. This fact was corroborated by statements of three terminated employees, Penrose Hallowell, Frank H. Pope, and Gilbert L. French, who testified as to their budgetary authority and their distribution of millions of dollars in a state program. Each State Director supervised a substantial staff which numbered approximately 100 state-wide. Each director acted as a public speaker and educator regarding the administration's programs. The director thereby served as the administration's pipeline and advocate at the state and the local level.

6. The positions of FmHA State Directors and ASCS State Executive Directors have been designated by the United States Civil Service Commission as "Schedule A" in the "excepted service",[3] pursuant to 5 U.S.C. § 3302 and 5 C.F.R. §§ 6.2, 213.3101 *et seq.* The three schedules in the "excepted service" are defined as follows:

> Schedule A. Positions other than those of a confidential or policy-determining character for which is not practicable to examine shall be listed in Schedule A.

[3]The term "excepted service" connotes positions "excepted" from the competitive requirements of the Civil Service Commission., 5 C.F.R. § 6.1.

> Schedule B. Positions other than those of a confidential or policy-determining character for which it is not practicable to hold a competitive examination shall be listed in Schedule B. Appointments to these positions shall be subject to such noncompetitive examination as may be prescribed by the Commission.
>
> Schedule C. Positions of a confidential or policy-determining character shall be listed in Schedule C.

7. On March 1, 1977, the Department of Agriculture requested the Commission to convert the ASCS positions from Schedule A to Schedule C. The Commission has not yet acted on the request. As of the date of the hearing, the Department of Agriculture has not requested a conversion for the Farmers Home Administration positions.

8. On April 22, and April 25, 1977, the Department of Agriculture and Mr. Victor A. Senechel, Acting Administrator of ASCS, indicated that at the direction of the Secretary of Agriculture, a review was undertaken of all incumbents in the FmHA and ASCS directors positions. The objective of the review was to determine which individuals were of such outstanding quality that they would be retained. Mr. Senechel conducted the review based on his personal knowledge of the incumbents and his lengthy experience with the Department's programs. Mr. Gross participated in overseeing the review of both the agencies' positions and received comments from officials of the previous administration, civil rights and public groups, members of Congress, and State governors.

9. Because the FmHA and ASCS State Directorships are positions excepted from the competitive service, they were viewed historically as patronage jobs. Thus, it was generally understood and expected that the incumbents would be replaced by individuals who supported the policies and programs of the new administration.

10. It was the desire of the Department of Agriculture to simplify the proceedings by avoiding problems of veterans preference. The termination of non-veterans, who would have no right of administrative appeals, occurred first.

11. Although all incumbents, except one, were appointed during the Nixon-Ford administrations, the testimony was uncontroverted that the Carter administration did not know in fact to which political party the incumbents belonged, nor did officials at the Department of Agriculture, at any time, suggest or coerce the incumbents to support the Democratic Party in return for retaining their jobs.

Conclusions of Law

1. The Civil Service Commission is not properly before this Court because it is not a usable entity *eo nomine. Blackmar v. Guerre,* 342 U.S. 512, 515 (1952).

2. Furthermore, the Court lacks subject matter jurisdiction over the controversy with respect to the issues addressed to the Commission. The Commission has not taken any action to remove any positions from Schedule A. Therefore, plaintiff has failed to present issues which can be "pressed before the Court with the clear concreteness provided when a question emerges precisely framed and necessary for decision from a class

of adversary argument exploring every aspect of a multifaced situation embracing conflicting and demand interests . . ." *Flast v. Cohen,* 392 U.S. 83, 95-97 (1968). In such circumstances, the Court is not presented with a case or controversy sufficient to satisfy the jurisdictional requirements of Article III of the Constitution. See *International Long Shoremen's and Warehousemen's Union v. Boyd,* 347 U.S. 222 (1954).

3. Plaintiff has failed to demonstrate that the terminated employees have a statutory or constitutional right to a statement of reasons and a hearing upon dismissal.

4. In order to establish a right to such procedural due process, plaintiff must show that such a right is conferred by statute, by regulation, by the terms of this employment, or that such a right is afforded under the Fifth Amendment to the Constitution because of a property interest in the job.

5. An employee in the excepted service, however, is simply not entitled to the benefits accorded those in the competitive service under the Lloyd-LaFollette Act, 5 U.S.C. § 7501. *Chollar v. United States,* 130 Ct.Cl. 338 (1954). Specifically, an employee in the excepted service, who is not a veteran, has no statutory or regulatory right to a statement of reasons, or adverse action appeal rights. 5 C.F.R. § 752.103(a)(6); see also *Vitarelli v. Seaton,* 359 U.S. 535, 539 (1959).

6. In light of the nature and terms of the employment, (*e.g.,* the excepted service), and in view of the fact that the non-veterans are excepted from statutory provisions granting due process protections, there is no property right to continued employment under which constitutional protections could be invoked. *Codd v.*

Velger, ____ U.S. ____, 97 S.Ct. 882, 884 (1977); *Board of Regents v. Roth,* 408 U.S. 564, 576-578 (1972); *Keim v. United States,* 177 U.S. 290 (1900). Indeed, our own Court of Appeals has made it clear that:

> [D]etermining the employment relationship . . . specifically negates a reasonable prospect of continued employment which might otherwise give rise to a legitimate claim of entitlement requiring procedural due process protection.

Mazeleski v. Treusdell, No. 75-1817 op. 13-14 (D.C. Cir. April 26, 1977).

7. The discharge of plaintiff's members does not constitute a violation of their First Amendment rights to freely associate. Plaintiff's reliance on the Supreme Court's recent decision in *Elrod v. Burns,* 427 U.S. 347 (1976) is misplaced. The plaintiffs in *Elrod* whose discharge was found to violate the First Amendment, were employees of the Cook County, Illinois, Sheriff's Office, not Federal employees. They occupied ministerial positions such as process server, bailiff, security guard, and clerk. The duties and responsibilities of the positions affected here are obviously of an entirely different nature from those occupied by the plaintiffs in *Elrod.*

8. Even assuming *arguendo* that *Elrod* is applicable to the Federal Government's Schedule A employees, the facts of the instant case fall within the exception in *Elrod,* not the general rule. In *Elrod,* five justices agreed that plaintiffs because they occupied only nonpolicy-making, nonconfidential positions, could not be discharged upon the sole ground of their political beliefs. However, the plurality opinion indicated that, if the plaintiffs had occupied policy-making positions, a

dismissal for political reasons would have been justified. 427 U.S. at 367-368. The Court discussed the policy-making/nonpolicy-making distinction as follows:

> No clear line can be drawn between policymaking and nonpolicymaking positions. While nonpolicymaking individuals usually have limited resposibilities is not to say that one with a number of responsibilities is necessarily in a policymaking position. The nature of the responsibilities is critical. Employee supervisors, for example, may have many respon-
>
> limited and well-defined objectiveds. *An employee with responsibilities that are not well-defined or are of broad scope more likely functions in a policymaking position. In determining whether an employee occupies a policymaking position, consideration should also be given to whether the employee acts as an advisor or formulates plans for the implementation of broad goals* . . . 427 U.S. at 367-368 (emphasis added)

9. The responsibilities of FmHA State Directors (all of whom are grade GS-15 employees) and ASCS State Executive Directors (who are either grade GS-13, GS-14, or GS-15 employees) as set forth in their position descriptions are "policymaking" responsibilities, as that term is defined in *Elrod.* The ASCS State Executive Director, grade GS-15, for example is described as

> [F]ully responsible for planning, organizing, and directing the program and management operations of ASCS activities throughout the State. Within broad policy, makes decisions

> and commitments on all phases of administration of the assigned programs, and actively participates . . . in State ASCS program and policy formulation. Recommends changes and revisions in State and National policies . . .

Similarly, the FmHA State Director:

> [F]ormulates and implements the total FHA program within the State jurisdictional area, exercising executive leadership in developing and implementing operating principles and practices desirable or necessary to promote and achieve the purposes and objectives of the overall FHA program or specialized phases thereof. Gives emphasis to development of annual goals and long-range plans of operations. . . .

These responsibilities are of broad scope, and include participation in the formulation of program policies and procedures. The difference between these positions and those of the plaintiffs in *Elrod* is substantial.

10. That these positions have been designated as Schedule A by the Civil Service Commission, rather than Schedule C "confidential or policy-determining positions," 5 C.F.R. § 213.3301, does not mean that they are not policy-making" positions within the ambit of *Elrod.*

11. In *Elrod,* plaintiffs were discharged because they were not members of a political party and had failed to obtain the sponsorship of one of the party's leadership. It appears from the facts of *Elrod* that plaintiffs in that case could have retained their employment by the simple expedient of affiliating with the Sheriff's party. From

these facts, the plurality concluded that the Sheriff was interfering with the free association of rights of his employees and the concurring judges concluded that the employees were discharged solely because of their "political beliefs." However, there are no facts in the record to show that the Secretary of Agriculture would have permitted any of these employees to remain if they affiliated with the Democratic Party, no facts to show that the Secretary attempted in any way to require these persons to associate with his own party, or interfered in any way with their exercise of First Amendment rights, as was the case in *Elrod.* Plaintiff has simply failed to establish an infringement of a constitutional guarantee.

12. Plaintiff in seeking a preliminary injunction has failed to satisfy the familiar prerequisites for extraordinary relief enunciated in *Virginia Petroleum Jobbers v. F.P.C.,* 104 U.S. App. D.C. 106, 259 F.2d 921 (1958). *See also Sampson v. Murray,* 415 U.S. 61 (1974).

/s/ J. H. Pratt
JOHN H. PRATT
UNITED STATES DISTRICT JUDGE

APPENDIX B

[No Opinion]

Filed Jun 21 1978

George A. Fisher
Clerk

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 77-1632 September Term, 1977

COMMITTEE TO PROTECT THE FIRST AMENDMENT RIGHTS OF EMPLOYEES OF THE DEPARTMENT OF AGRICULTURE,
Appellant

v. Civil Action

BOB BERGLAND, Individually and as Secretary of Agriculture, *et al.* No. 77-0481

Appeal from the United States District Court for the District of Columbia.

Before: WRIGHT, Chief Judge, MacKINNON, Circuit Judge, and HOFFMAN,* Senior District Judge.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the court. *See* Local Rule 13(c).

*Of the United States District Court for the Eastern District of Virginia, sitting by designation pursuant to 28 U.S.C. § 292(d) (1970).

On March 29, 1978 appellee addressed a letter to the Chairman of the United States Civil Service Commission, copy of which is attached to this judgment. Since this letter was not available to the District Court prior to its judgment dismissing this case,

It is ORDERED and ADJUDGED by this court that this case is remanded to the District Court to reopen the record for consideration of this letter and any additional evidence that may be related thereto.

Per Curiam

For the Court

/s/ George A. Fisher
George A. Fisher
Clerk

[Received May 31 1978
Clerk of the United States
Court of Appeals]

Honorable Alan K. Campbell
Chairman
U.S. Civil Service Commission
Washington, D.C. 20415

Dear Scotty:

The top State positions in both the Farmers Home Administration (FmHA) and the Agricultural Stabilization and Conservation Service (ASCS) of this Department are filled through Excepted Appointment Authorities. This has been the case since the 1950's when the positions were converted to Schedule A. We are both aware of significant difficulties which this situation has caused with every change of Administration since that time.

We have recently reviewed this situation and I have decided that the existing Schedule A authorities are inappropriate for these key field positions.

There are significant differences between the two Agencies. In the case of ASCS, the State Executive Directors must by the nature of their positions be deeply involved in supporting and defending the farm policies and programs of the Administration. These policies and programs are politically controversial. I firmly believe that these positions should be placed in Schedule C.

The FmHA State Directors are, by contrast, responsible for managing a business type operation. Their loan programs do not generate the same degree of political con-

troversy. In my opinion, existing examining capabilities can properly provide for competitive career appointments to these positions. I believe that FmHA State Directors should be in the career service.

I wanted you to know my intentions on this serious matter in advance of any formal presentation by this Department.

In the very near future, we will be forwarding our formal requests and justifications on this matter.

Sincerely,

APPENDIX C
Filed Aug 11 1978
James F. Davey, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMITTEE FOR THE PROTECTION OF FIRST AMENDMENT RIGHTS OF DEPARTMENT OF AGRICULTURE EMPLOYEES, Plaintiff	)	
v.	)	Civil Action No. 77-481
BOB BERGLAND, individually and as Secretary of Agriculture, Defendant	)	

MEMORANDUM

By Order of June 21, 1978, the Court of Appeals remanded this case with directions to reopen the record for consideration of a letter written March 29, 1978 by defendant Bergland to the Chairman, U.S. Civil Service Commission. No. 77-1632 (D.C. Cir.). The action was in the Court of Appeals on appeal by plaintiff of our denial of its application for a preliminary injunction and grant of defendant's motion to dismiss. 434 F. Supp. 314, 320 (D.D.C. June 3, 1977). After the action was remanded, the parties filed cross-motions for summary judgment. For the reasons given hereinafter, defendant's motion for summary judgment will be granted.

The circumstances giving rise to this action are set forth in the Findings of Fact and Conclusions of Law entered herein June 3, 1977. 434 F. Supp. at 316-18. Since our disposition of the action, two letters have passed between Secretary Bergland and the Civil Service Commission, and it is on the strength of these letters that the record herein is reopened. The first letter, dated August 5, 1977, informs the Secretary that the Commission has decided not to approve his request that the Agricultural Stabilization and Conservation Service [ASCS] state executive director positions be transferred within the excepted service from Schedule A [nonconfidential and nonpolicymaking positions for which competitive examinations are impractical] to Schedule C [positions of a confidential or policymaking nature]. The letters gives as a reason only that "[t]he Commission cannot conclude at this time that these [ASCS] positions meet the Schedule C criteria for exception as policy-determining or confidential." The second letter is that which precipitated the remand of this case. It sets forth Secretary Bergland's decision that the "top State positions" in both the ASCS and the Farmers Home Administration [FmHA] should not be classified under Schedule A. However, the letter does not suggest that the two sets of positions should be reclassified similarly:

> There are significant differences between the two Agencies. In the case of ASCS, the State Executive Directors must by the nature of their positions be deeply involved in supporting and defending the farm policies and programs of the Administration. These policies and programs are politically controversial. I firmly believe that these positions should be placed in Schedule C.

> The FmHA State Directors are, by contrast, responsible for managing a business type operation. Their loan programs do not generate the same degree of political controversy. In my opinion, existing examining capabilities can properly provide for competitive career appointments to these positions. I believe that FmHA State Directors should be in the career service.

The ostensible purpose of the Secretary's letter was to inform the Civil Service Commission chairman of "my intentions on this serious matter in advance of any formal presentation by this Department." In an affidavit submitted with defendant's motion, the Secretary indicates he has decided against formally requesting conversion of the FmHA directorships to the career service. Both the ASCS and FmHA positions remain in Schedule A.

Plaintiff's argument is that these two letters, taken together, indicate that the ASCS and FmHA directorships are nonpolicymaking, nonconfidential positions, and hence that the April, 1977 termination of certain directors was improper. Plaintiff asserts that the Secretary's determination that FmHA directors should be in the career service constitutes "an admission that the patronage dismissals of plaintiff's members are not lawful." Similarly, plaintiff argues that the Civil Service Commission "ruling on the non-policy status of the plaintiff [ASCS] state directors must be observed." On consideration of the letters, we conclude that they do not affect the premises which dictated our decision June 3, 1977.

As a preliminary matter, it should be noted that these letters' relevance, if any, is to plaintiff's argument that

the April, 1977 terminations violate the proscription against patronage dismissals of nonpolicymaking, nonconfidential employees. *Elrod v. Burns,* 427 U.S. 347, 373 (1976). In no sense can either letter be construed to confer on ASCS and FmHA directors the benefits and protections accorded those in the competitive service under the Lloyd-LaFollette Act, 5 U.S.C. § 7501. Thus, the sole question is whether either letter affects our previous determination that the ASCS and FmHA directorships are "policymaking" positions within the scope of the exception in *Elrod.* In essence plaintiff's position is that the Commission's determination that ASCS directorships do not qualify for Schedule C status and the Secretary's determination that FmHA directorships should be in the competitive service are each dispositive of the question whether each directorship is a policymaking position. To accept this thesis would be to render an employee's constitutional rights under *Elrod* coextensive with his rights under statute and regulations, and hence to cede the judicial function of delimiting constitutional rights to the executive.

The Supreme Court's statement in *Elrod* that "[n]o clear line can be drawn between policymaking and nonpolicymaking positions" militates against drawing such lines solely on the basis of the schedule or service under which the position is classified. 427 U.S. at 367. Similarly, as we noted in the Findings and Conclusions entered herein, "[t]hat these positions have been designated as Schedule A by the Civil Service Commission, rather than Schedule C 'confidential or policy-determining positions,' 5 C.F.R. § 213.3301, does not mean that they are 'not policy-making' positions within the ambit of *Elrod.*" Secretary Bergland's opinion that the FmHA directorships should be in the competitive service is no

more determinative. Indeed, the distinction drawn in his letter between the ASCS and the FmHA positions seems predicated entirely on the differing political sensitivity of the two sets of directorships, and not at all on any difference in the policymaking responsibilities of the positions. That the FmHA is a "business type operation" the programs of which engender comparatively little political controversy has no discernible bearing on the extent to which FmHA state directors make policy.

In determining previously that the ASCS and FmHA directorships are policymaking positions within the *Elrod* exception, we rejected the argument that the positions' Schedule A status was determinative of that issue. The August 5, 1977 and March 29, 1978 letters effect no change in the duties of these positions; instead, they bear on the classification of the positions. Accordingly they do not affect the validity of our previous conclusions. An Order consistent with the foregoing will be entered this day.

/s/ J. H. Pratt
JOHN H. PRATT
United States District Judge

10 August, 1978

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMITTEE FOR THE PROTECTION OF FIRST AMENDMENT RIGHTS OF DEPARTMENT OF AGRICULTURE EMPLOYEES, Plaintiff	)	
v.	)	Civil Action
	)	No. 77-481
BOB BERGLAND, individually and as Secretary of Agriculture Defendant	)	

ORDER

This action having been remanded for consideration of a letter of March 29, 1978 from defendant to the chairman, U.S. Civil Service Commission, No. 77-1632 (D.C. Cir. June 21, 1978), and this Court having reopened the record for consideration of said letter and any additional evidence submitted by the parties, and it appearing that said letter and additional evidence do not affect our previous determination herein, *see* Findings of Fact and Conclusions of Law, 434 F. Supp. 314 (D.D.C. 1977), and that defendant is entitled to judgment as a matter of law in the absence of any genuine issue of material fact herein, Fed.R. Civ. P. 56(c), it is by the Court this 10th day of August, 1978

ORDERED, that defendant's motion for summary judgment be, and hereby is, granted, and it is further

ORDERED, that plaintiff's motion for summary judgment be, and hereby is, denied, and it is further

ORDERED, that this action be, and hereby is, dismissed, the parties to bear their own costs.

/s/ J. H. Pratt
JOHN H. PRATT
United States District Judge

APPENDIX D

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-2030

COMMITTEE TO PROTECT THE FIRST AMENDMENT RIGHTS OF EMPLOYEES OF THE DEPARTMENT OF AGRICULTURE, APPELLANT

v.

BOB BERGLAND, INDIVIDUALLY AND AS SECRETARY OF AGRICULTURE, APPELLEES

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil 77-0481)

Argued October 15, 1979

Decided December 27, 1979

Carl L. Shipley, for appellant.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

John H. E. Bayly, Jr., Assistant United States Attorney with whom *Earl J. Silbert*,* United States Attorney, *John A. Terry, Peter D. George* and *David H. Shapiro*, Assistant United States Attorney were on the brief, for appellee.

Walter H. Fleischer and *Alfred F. Belcuore* were on the brief for Amicus Curiae urging reversal.

Before: LEVENTHAL,** ROBB and WALD, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* LEVENTHAL.**

LEVENTHAL, *Circuit Judge*: This appeal presents a claim that the Secretary of Agriculture had denied employment on the basis of political beliefs and associations. The Committee to Protect the First Amendment Rights of Employees of the Department of Agriculture (Committee) brought the action for declaratory and injunctive relief, claiming that its members had been denied employment on that basis in violation of their constitutional rights. The district court granted the Secretary's motion for summary judgment, and we affirm.

I. BACKGROUND

The Committee is an *ad hoc* organization composed of former employees of the Department of Agriculture who occupied positions in the field service as either State Directors of the Farmers Home Administration (FmHA) or State Executive Directors of the Agricultural Stabilization and Conservation Service (ASCS). The United States Civil Service Commission (Commission) has ex-

* United States Attorney at the time the brief was filed.

** This opinion was written by Circuit Judge Leventhal and concurrences were received from the other Judges prior to his death.

cepted both positions from the competitive civil service, classifying them Schedule A.[1] The Commission's general regulations concerning Schedule A (and Schedule B and C) positions are in the margin.[2] The Schedule A jobs are defined as "positions other than those of a confidential or policy determining character for which it is not practicable to examine . . ." [3]

On April 22 and April 25, 1977, the newly appointed Secretary of Agriculture discharged a total of nine FmHA State Directors and seventeen ASCS State Executive Directors. The Committee brought this lawsuit in district court, and sought injunctive relief, claiming the Secretary was "dismissing and threatening to dismiss [its] members from their positions . . . for partisan political reasons and threatening to and has appointed

[1] 5 C.F.R. §§ 213.3101, 213.3113(d)(3) and (e)(4) (1978).

[2] 5 C.F.R. § 6.2 (1978).

> § 6.2 *Schedules of excepted positions.*
>
> The Commission shall list positions that it excepts from the competitive service in Schedules A, B, and C, which schedules shall constitute parts of this rule, as follows:
>
> *Schedule A.* Positions other than those of a confidential or policy-determining character for which it is not practicable to examine shall be listed in Schedule A.
>
> *Schedule B.* Positions other than those of a confidential or policy-determining character for which it is not practicable to hold a competitive examination shall be listed in Schedule B. Appointments to these positions shall be subject to such non-competitive examination as may be prescribed by the Commission.
>
> *Schedule C.* Positions of a confidential or policy-determining character shall be listed in Schedule C.

[3] 5 C.F.R. § 6.2 (1978); 5 C.F.R. § 213.3101 (1978). The same definition appears in the Commission's regulations regarding such posts in the Department of Agriculture. 5 C.F.R. § 213.3101 (1978).

political supporters of the Carter administration to the positions now occupied by [those] members in consideration of their political support." [4]

The district court denied a temporary restraining order and consolidated the hearings on plaintiff's motion for preliminary injunction and defendants' motion to dismiss the complaint. On June 3, 1977, the district court dismissed the complaint.[5]

Subsequently, two letters were sent from the Chairman of the Commission to the Secretary. On August 5, 1977, the Commission declined the Secretary's request to reclassify State Executive Directors of ASCS from Schedule A to Schedule C.[6] It stated: "The Commission cannot conclude at this time that [State Executive Directors of ASCS] meet the Schedule C criteria for exception as policy-determining or confidential." In the second letter,

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[4] Complaint, Paragraph 6.

[5] Committee for Protection of First Amendment Rights of Department of Agriculture Employees, 434 F. Supp. 314 (D.D.C. 1977).

[6] The Chairman's letter read:

> Dear Mr. Secretary:
>
> This refers to your request for Civil Service Commission approval to convert from Schedule A to Schedule C 50 State Executive Director positions in the Agricultural Stabilization and Conservation Service.
>
> The Commission cannot conclude at this time that these positions meet the Schedule C criteria for exception as policy-determining or confidential. We are therefore unable to approve your request.

Exhibit "E" of Memorandum of Points and Authorities supplementing appellant's brief.

Secretary's Bergland's request was in a letter to the Commission dated March 1, 1977. Appendix to appellant's brief at 10-11.

dated March 29, 1978, the Secretary refined his position.[7] He repeated his view that difficulties had arisen in consequence of the action taken in the 1950's, which converted to Schedule A the positions of state directors of ASCS and FmHA. He reiterated his opinion that State Directors of ASCS should be converted from Schedule A to

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[7] Secretary Bergland's letter to Chairman Campbell read:

> Dear Scotty:
>
> The top State positions in both the Farmers Home Administration (FmHA) and the Agricultural Stabilization and Conservation Service (ASCS) of this Department are filled through Excepted Appointment Authorities. This has been the case since the 1950's when the positions were converted to Schedule A. We are both aware of significant difficulties which this situation has caused with every change of Administration since that time.
>
> We have recently reviewed this situation and I have decided that the existing Schedule A authorities are inappropriate for these key field positions.
>
> There are significant differences between the two Agencies. In the case of ASCS, the State Executive Directors must by the nature of their positions be deeply involved in supporting and defending the farm policies and programs of the Administration. These policies and programs are politically controversial. I firmly believe that these positions should be placed in Schedule C.
>
> The FmHA State Directors are, by contrast, responsible for managing a business type operation. Their loan programs do not generate the same degree of political controversy. In my opinion, existing examining capabilities can properly provide for competitive career appointments to these positions. I believe that FmHA State Directors should be in the career service.
>
> I wanted you to know my intentions on this serious matter in advance of any formal presentation by this Department.
>
> In the very near future, we will be forwarding our formal requests and justifications on this matter.

Exhibit "F" of Memorandum of Points and Authorities supplementing appellant's brief.

Schedule C. He indicated a distinction as to FmHA State Directors which he believed "should be in the career service." [8] This court remanded the case to the district court for consideration of the March 29, 1978 letter and any related evidence.[9]

Upon remand, the district court reopened the record to consider the letter of August 5, 1977 as well as that of March 29, 1978. Both parties filed motions for summary judgment. By Memorandum Opinion and Order dated August 10, 1978, the district court, finding that the "letter and additional evidence [did] not affect [its] previous determination," granted summary judgment [10] to the Secretary. Plaintiff's appeal followed.

II. Analysis

In *Elrod v. Burns*, 427 U.S. 347 (1975), the Supreme Court declared unconstitutional the dismissal of nonpolicymaking government employees because of their partisan political affiliation or nonaffiliation. Justice

[8] At oral argument, counsel for the government represented that the Secretary had repudiated his earlier position that FmHA State Directors belonged in the classified civil service. The *amicus curiae* makes reference to the fact that the Secretary had "retreated" from the earlier position, and cites a Declaration of Bob Bergland dated July 24, 1978 to the effect that "the appropriate classification to permit needed flexibility in appointment authority for [the position of FmHA] is Schedule C." Brief for Amicus Curiae Mahlon M. Delong at 14.

[9] Committee to Protect the First Amendment Rights of Employees of the Department of Agriculture v. Bergland (D.C. Cir. No. 77-1632, June 21, 1978).

[10] Committee for the Protection of First Amendment Rights of Department of Agriculture Employees v. Bob Bergland (Civil Action No. 77-0481, August 11, 1978), reproduced as Exhibit "C" of Memorandum or Points and Authorities Supplementing Appellant's Brief.

Brennan, writing for the plurality, relied upon *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) and *Perry v. Sinderman*, 408 U.S. 593 (1972), to advance the proposition that government cannot condition the retention of government positions on demands which would be unconstitutional if made directly. 427 U.S. at 358-60. The opinion responds to the needs of a new administration to insure that its policies will not be undercut by obstructionist tactics, but it does so by "limiting patronage dismissals to policymaking positions." 427 U.S. at 367. Justices Stewart and Blackmun completed the majority, confining themselves to concurring in the result on the ground that a "nonpolicymaking, nonconfidential government employee can [not] be discharged from a job that he is satisfactorily performing upon the sole ground of his political beliefs." 427 U.S. at 374-75 (Stewart, J. concurring). In applying the *Elrod* standard, therefore, we must look to (1) the nature of the position involved and (2) the ground for dismissal.

A. *The Nature of the Positions Involved*

The Committee contends that the two posts held by its members are not policymaking positions. The district court disagreed. While it is true that "[n]o clear line can be drawn between policymaking and nonpolicymaking positions," 427 U.S. at 367, the Supreme Court has proffered some general principles that guide our consideration:

> While nonpolicymaking individuals usually have limited responsibility, that is not to say that one with a number of responsibilities is necessarily in a policymaking position. The nature of the responsibilities is critical. Employee supervisors, for example, may have many responsibilities, but those responsibilities may have only limited and well-defined objectives. An employee with responsibilities that are not well

> defined or are of broad scope more likely functions in a policymaking position. In determining whether an employee occupies a policymaking position, consideration should also be given to whether the employee acts as an adviser or formulates plans for the implementation of broad goals.

Id. at 367-68.

In determining whether the pertinent positions are policymaking, the district court considered the published job descriptions.[11] The ASCS State Executive Director, grade GS-15, is described as:

> [F]ully responsible for planning, organizing, and directing the program and management operations of ASCS activities throughout the State. Within broad policy, makes decisions and commitments on all phases of administration of the assigned programs, and actively participates . . . in State ASCS program and policy formulation. Recommends changes and revisions in State and National policies.

The FmHA State Director, grade GS-15:

> [F]ormulates and implements the total FHA program within the State jurisdictional area, exercising executive leadership in developing and implementing

[11] Order of June 3, 1977, *supra* note 5. Findings of Fact 1-4, 434 F. Supp. 314 at 316-17; Conclusion of Law 9, *id.* at 319.

It is possible that in a particular case an employee might believe that the job description was overblown, and that it is a facade hiding what is actually performance of a ministerial function. But that would not necessarily end the matter, because the cabinet officer might wish to change the method of operation so as to assure a stronger policy component in order to achieve the objectives of his administration. We need not, and do not, reach that point, however, because in this case appellant has not presented the matter to us on the basis that it has penetrated a facade.

> operating principles and practices desirable or necessary to promote and achieve the purposes and objectives of the overall FHA program or specialized phases thereof. Gives emphasis to development of annual goals and long-range plans of operation.

There is no contention that these job descriptions are a spurious facade.

In his inquiry, the district judge also considered testimony from two government witnesses and three of the terminated employees that the directors "exercise considerable control over the implementation of the administration's agricultural program policies at the state and local level, and, thereby, insure either the success or failure of the programs." [12]

This evidence fully justified the district court in concluding that the positions in question were policymaking ones. That conclusion is reinforced by the likelihood that persons administering huge Federal government programs for an entire state will have a high policy component to their activities, both because such large scale exercise of power usually implicates substantive internal policy, and because such positions are a natural source for influential recommendations of changes in policy. Each state director supervises a staff of nearly 100 statewide and acts as "the administration's pipeline and advocate at the state and local level." [13]

Appellant argued its case, both in the district court and before us, on the theory that the courts are controlled by the Commission's determination, in classifying the posts, that they were nonpolicymaking. We reject that view. Obviously, a Commission determination would not be conclusive against an individual who claimed that

[12] Finding of Fact 5, 434 F. Supp. 314, 317.

[13] *Id.*

the agency had been overly restrictive in defining his constitutional rights. The content and scope of constitutional rights—their minima and maxima—are the special province of the courts.[14]

In approaching the constitutional inquiry we of course take into consideration the determination of the Civil Service Commission. In this litigation, however, we are confronted by the difficulty that the Commission has evolved a specialized terminology and set of classifications. The positions in Schedules A and C are both "excepted" from the competitive civil service, but the relationship between these schedules is not easy to ascertain—as is evident from a reference to the Commission's reports.[15] What is certainly plain is that the basis of the

[14] Appellant argues that a reviewing court must give deference to an agency's interpretation of its governing statute and regulations, and that, therefore, the Civil Service Commission's classification of ASCS and FmHA positions should control our consideration of the matter. Appellant's brief at 10-11. This argument misses the point. We are not interpreting the CSC regulations, rather we are defining the constitutional status of the positions held by appellant's members. The question in this case is not what the CSC regulations mean, but whether they are conclusive on the constitutional isue.

[15] The two broad categories of federal employment are the competitive service and the excepted service, with the "career service" being generally a subset of the former. The competitive service includes any position for which an "exam" is given, which "exam" can be either a written test or a more general "review" of the candidate's education and experience. *See generally* United States Civil Service Commission Fiscal 1977 Annual Report (1978); *see also* Federal Personnel Manual at 212-3 to 212-5 (July 31, 1978). Schedule A and Schedule C positions are generally in the excepted service, but some of them are held by employees with competitive status under conditions that make the positions competitive while those employees remain in them. Federal Personnel Manual at 212-4 (July 31, 1978).

Commission's distinctions is different from the basis underlying the *Elrod* categories.[16]

The point is dramatized by the fact, brought out at oral argument, that at least some attorneys on the White House staff are classified Schedule A—that is, classified by the Commission as occupying positions not of a policymaking or confidential character. In fact, there are substantial numbers of attorneys in government service classified as Schedule A.[17] So also are law clerks, chaplains, and some officials appointed by the President without confirmation by the Senate, among others.[18] By contrast at least some stenographic secretaries, a category of secretaries distinct from private secretaries, are classified as policymaking or confidential.[19]

A court ruling that a position has a policymaking character which makes *Elrod* inapplicable is not to be taken as condemning any action of the Commission in classifying the position as Schedule A. The Civil Service Commission may classify positions as Schedule A rather than Schedule C in order to nudge forward toward the goal of enhancing a "career" civil service. Both Schedule A and Schedule C positions are excluded from the competitive civil service. The distinction has legal—not constitutional—significance in that veterans holding Schedule A positions acquire procedural rights under current laws

[16] The Civil Service regulations involved here were promulgated in 1963, more than a decade before *Elrod*. Consequently, it cannot be argued that they were designed to implement the standards articluated in that case.

[17] § 213.3101 Federal Personnel Manual (July 31, 1978).

[18] *Id.*

[19] *See, e.g.*, United States Civil Service Commission Fiscal 1977 Annual Report at 78 (1978).

and regulations.[20] And in common understanding, Schedule A positions are considered less "political" than those in Schedule C, so that in practice holders of Schedule A positions are less likely to seek or accept political assignments on their own time, and are more likely to have *de facto* tenure even with political changes. However, if a position does have significant policymaking components, it cannot be given *Elrod*-constitutional status merely on the basis of hopeful expectations. And appellant did not challenge the analysis of the district court, but relied solely on the Commission's classification.

In the initial proceeding on these positions, the district court did not ignore the CSC designation of them, but explicitly weighed that as a factor in its consideration of the nature of the two positions involved.[21] On remand, the court expressly considered whether either of the two letters affected its "previous determination that the ASCS and FmHA directorships are 'policymaking' positions within the scope of the exception in *Elrod*." [22] It concluded that the "letters effect no change in the duties of [the] positions . . . instead, they bear on the classification of the positions," [23] and that its earlier determination was correct. We agree.

B. *Ground for Dismissal*

Elrod holds that it is impermissible for a government agency to dismiss a nonpolicymaking employee solely for political reasons. It does not bar every termination of a nonpolicymaking official. In invoking *Elrod*, appellant relies on a statement of the district judge during the

[20] None of the terminations challenged by the appellant related to veterans.

[21] 434 F. Supp. 314 at 320.

[22] Memorandum of August 11, 1978, *supra* note 4, at p. 3.

[23] *Id.* at p. 4.

course of the proceeding that "these were patronage dismissals, pure and simple." [24] But the district court decision notes uncontroverted testimony that the administration did not know to which political party the incumbents belonged and that the Secretary never attempted to coerce the members of Appellant's group to change their party in order to retain their jobs.[25] There is evidence in the record that the purpose of the Secretary's personnel review was to spotlight incumbents "of such outstanding qualities that they should be retained" when most incumbents were being replaced "by individuals who supported the policies and programs of the new administration." [26]

This case differs in some significant respects from *Elrod* as to the reasons for the terminations. The district court did not find that the employees were dismissed solely for political reasons, and indeed cited parts of the record that point to a motivation of the Secretary to enhance policy formulation and execution. However, since we hold that the positions involved are policymaking, we need not and do not consider whether appellant's showing would suffice to establish a constitutional infringement if the positions were nonpolicy in character.

III. Conclusion

It is for the court, not the Civil Service Commission, to decide whether a position is policymaking for constitutional purposes within the meaning of *Elrod v. Burns*. The district court gave due consideration to the Commission's classification, and to the correspondence between the Commission and the Secretary of Agriculture.

[24] Transcript of May 13, 1977 at 100.

[25] Order of June 3, 1977, *supra* note 5, 434 F. Supp. at 318.

[26] *Id.* at 317-18.

It emphasized the evidence introduced on the nature of the positions. We affirm the conclusion that the positions occupied by the members of appellant's group were policy-making and therefore the discharge of the incumbents did not infringe upon their constitutional rights.[27]

Affirmed.

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[27] As already noted, *supra* page 7, Justice Brennan's opinion *Elrod* stated that the need to implant the policy of a new administration is secured by permitting "patronage dismissals" for policymaking positions. There is no indication that the dismissal must be further justified by a determination that the incumbent would fall short in discharge of new policy directives.